Supreme Court of the United States

October Term, 1930. No. 95.

UNITED STATES OF AMERICA,
Appellant,

against

FIRST NATIONAL PICTURES, INC., *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEES' BRIEF.

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IN THE

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UNITED STATES OF AMERICA, *Appellant,* *against* FIRST NATIONAL PICTURES, INC., *et al.*, *Appellees.*	No. 95

APPELLEES' BRIEF.

Preliminary Statement.

The United States has appealed to this Court from a final decree of the United States District Court for the Southern District of New York (THACHER, D. J.) dismissing, upon the merits and after trial, a suit in equity under the Sherman Act wherein the United States of America was the Petitioner. For the Opinion see 34 F. (2d) 815, R., p. 64.

The Appellees are ten of the leading producers of motion pictures in the United States and the principal agencies through which motion pictures are licensed and distributed to the exhibitors throughout the country.

The Petition.

The Petition, parts I-VII of which (covering R., pp. 1-19) are identical with corresponding parts of the Petition in the *Paramount Case* (Docket No. 83 of the

current Term), purports to found an unlawful conspiracy upon certain "Rules and Regulations for the Establishment and Operations of a Credit Committee" (R., p. 26), hereinafter referred to as the "Credit Rules", adopted by the appellee distributors in January, 1926. The petition charged that the defendants had conspired

> "a. To coerce and to require every exhibitor of motion pictures in the United States, acquiring a motion picture theatre by purchase or transfer, to assume and to perform every uncompleted contract for the exhibition of motion pictures in such theatre existing at the time of such purchase or transfer between the former owner or operator of said theatre and any defendant distributor and/or any other principal of any member of any defendant Film Board of Trade;
>
> "b. To deprive every exhibitor of motion pictures in the United States, acquiring a motion picture theatre by purchase or transfer, of the right to have any court having jurisdiction of the question settle and determine whether such purchase or transfer has been fraudulent and for the purpose of avoiding contractual obligations" (Pet., part VIII, R., p. 20).

The Answer.

The defendants deny the conspiracy charged, and set forth in the answer the facts peculiar to the motion picture industry, the nature and extent of the credit advanced by distributors to exhibitors in the ordinary course of business, the great number of changes of ownership of theatres occurring each year and the large losses sustained by defendants by reason thereof, the absence

of credit information and the need therefor, the purpose, nature and effect of the Credit Rules, the existence of keen competition in the industry, the intent of the defendants and the end sought to be attained by them. The defenses were to the effect that the Credit Rules were designed to protect the appellees from fraud, namely, from losses caused by the fraudulent transfer of motion picture theatres made to avoid uncompleted contracts, and that in practice the Rules were applied fairly and legitimately to accomplish the desired result of credit protection, that in effect no one was injured, and that the rules reduced the number of cases of fraud (Answer, paragraphs X through XIX, R., pp. 36-47).

Admissions by the Government as to Competition in the Industry.

The Government admitted for the purposes of this suit only (R., pp. 84, 85):

> "At all the times mentioned in the petition there has been, and there is today, competition throughout the United States in the distribution of motion-picture films by the defendant distributors and by other distributors engaged in the motion-picture business. At all such times the defendant distributors have been, and they are today, competing with each other and with all other distributors, in the distribution of their pictures throughout the United States [Answer, R., p. 45].
>
> "In each of the States and parts of States in which the branch offices of the distributors operate as stated in the petition and in which the branch managers of such branch offices solicit the business of the theatres located therein and distribute the pictures of their several companies all of the distributors distributing pictures therein, includ-

ing the 10 defendant distributors, the 77 regional distributors named in the petition, and other distributors not named, are competing with each other in the distribution and for the exhibition of their pictures, and they have been competing with each other at all the times mentioned in the petition [Answer, R., p. 45].

"Immediately after the announcement in the spring of each year of its program of pictures for the 12 months' period commencing the following fall, each distributor proceeds to solicit and conclude as many contracts as possible for the exhibition of such pictures with the thousands of exhibitors who own or operate the 22,000 theatres in the United States. *Each contract is a matter of negotiation and bargaining between the distributor and the exhibitor.* The great majority in number of the contracts of each distributor are solicited by the branch managers or by their salesmen, but the acceptance of each application for a contract is subject to the approval of the home or principal office of each distributor [Answer, R., p. 46].

"*In negotiating and bargaining for contracts with exhibitors* (the operators of theatres) in his territory, *each branch manager finds all the branch managers and salesmen of the other distributors who are doing business in his territory competing with him on contracts for feature pictures, short-subject pictures, comedies, specials, and news reels.* Similarly, when an operator of a motion-picture theatre requires an individual motion picture for a date in the immediate future for which date no pictures included in his group contracts are available or needs a picture to complete his program, each distributor who has a picture in his branch office available for such exhibition competes for the business and seeks through its branch manager

> and salesmen to conclude a contract with such exhibitor. This is known in the trade as 'spot booking'" (Pet., part V, 7, R., p. 13; Answer, R., p. 46; italics ours).

The general conduct of the motion picture industry and the organization and functions of the Film Boards of Trade were described in the pleadings in the *Paramount Case,* and the analysis of them made in our brief in that case (pp. 9-12) need not be repeated here.

The Trial.

The Government called no witnesses, but based its case upon documentary evidence, upon admissions in the Answer, and upon the cross-examination of the defendants' witnesses. The documentary evidence consisted of papers taken from the files of the defendants, concerning which counsel stipulated on the record as follows (R., pp. 78-79):

> "All of the exhibits introduced by the Government are copies of papers taken by the special agents of the Department of Justice from the files in the offices of the defendants and the film boards of trade, to which files the Government has been given the fullest access during the last four years, as stated in stipulation between counsel to be introduced."

The Government thereupon offered in evidence twenty-three volumes of papers (marked Exhibits 1-23), taken from the files of two of the defendant distributors and of twenty-one of the thirty-two Film Boards of Trade, and rested (R., p. 83). An additional volume (Ex. 24) was offered at R., p. 121. After counsel for the

defendants had examined the secretaries from three Film Boards of Trade (Dallas, Atlanta and Omaha) regarding the papers from the files of those Boards put in by the Government, counsel for both sides stipulated (R., p. 134) that the exhibits taken from the files of the Dallas, Atlanta and Omaha Film Boards of Trade were typical of the Government exhibits obtained from the other eighteen Film Boards of Trade. Counsel also stipulated that the testimony of the secretaries of Dallas, Atlanta and Omaha was typical of the testimony that would have been given by each of the secretaries of the other twenty-nine Film Boards of Trade if called and sworn to testify.

In view of the above stipulation, the Government withdrew all its exhibits except those relating to Dallas, Atlanta and Omaha (Exhibit 8, R., p. 182; Exhibit 4 and 4-A, R., pp. 139 and 149; Exhibit 18, R., p. 227), and the defendants' counsel agreed not to call as witnesses the secretaries of the other twenty-nine Film Boards of Trade (R., p. 135).

The Issues and the Opinion Below.

The question presented is the legality under the Sherman Act of the Credit Rules and the action taken by the defendants under the Credit Rules as shown by the record. We venture to say that one cannot read the record without being fairly convinced (1) that the Rules were necessary for the protection of the defendants against fraudulent transfers of theatres, and (2) that they were enforced with fairness and leniency.

The object of the Credit Rules was not to affect the assumption by transferees of the transferors' outstand-

ing contracts, but to reduce the number of transfers where the established purpose was to evade contractual obligations by colorable transfers of theatres, with consequent large losses to distributors. The Government argues, on the other hand, that the purpose was to compel the new owners to assume the uncompleted contracts of their predecessors, and bases its argument to a great extent on this assumption. We shall show below that the assumption is not well founded.

It is clear from the record that the transfer of a theatre to a dummy was a convenient and frequent means adopted by exhibitors who had gotten themselves into difficulties and that the Rules were designed to act as a deterrent for this class of fraud and that that has been their effect.

The exhibitor who transfers his theatre knows that litigation has been shown to be futile and that the injured distributors will probably not resort to it. The transferee in fraudulent cases, usually a convenient relative or employee, knows that the transfer will result in defrauding the distributors if he fails to assume the existing contracts. He can scarcely be described as the innocent party which the Government brief would have him be.

Even in such cases it should be noted that the transferee normally continues to get pictures either by the process of "spot booking" *, or by putting up the small security required either when the transfer is fraudulent or when he has refused to give the distributors the information requested, or by obtaining service under some of the existing contracts, or from non-member distributors.

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* *I. e.*, making leases picture by picture for immediate exhibition from available supplies, as opposed to booking by the season on prospectus prior to actual availability. And see R., p. 85.

We do not agree with the Government (brief, p. 6) that the distribution of motion pictures is entirely on a cash basis, thus implying that the Credit Rules must necessarily be performing functions other than those of credit. In this industry, credit is fairly entitled to a broader definition than the mere antithesis of cash.

The stipulation shows that no complaint is made of any reduction of competition among the distributors, and the last-minute attempt of the Government to maintain that competition among the exhibitors is affected must fail in view of the lack of evidence to support the charge and of the marked increase in the number of theatres in the country since the establishment of the Credit Rules (R., pp. 109, 280, 281).

In a further effort to show illegality the Government alleged (Pet., part IX, 4, R., p. 23), that the appellee Film Boards of Trade entered into agreements and understandings supplementing and exceeding the provisions of the Credit Rules, though the Petition concedes that the making of the supplemental agreements and the activities of the Appellees thereunder were "without the knowledge and against the general instructions of the defendant distributors and of the defendant association" (R., p. 23).

The findings of the District Court were against the contentions of the Government as to the existence of the supplemental agreements (R., p. 69), and the record fully sustains the conclusions of the Court (R., pp. 110, 111, 124, 125, 136).

As to the scope and effect of the Credit Rules, Judge THACHER took the view that, even though "financial and moral responsibility [of transferees of theatres] were subordinate considerations and the purpose in requiring

deposits on new contracts with old theatres was to induce the new owner to assume and perform the old contracts" (R., p. 69), nevertheless the "defendants' agreement to demand security was fully justified by their common interests in preserving the integrity of contractual obligations owing to them by others" (R., p. 71).

The truth is that the abuses were so general and the losses to distributors so large that the conditions could only be corrected by the common action of those interested in common. On the ground that the Rules had for their object and effect the elimination of trade abuses and the promotion of fair and honorable dealing, the Court upheld them, citing (R., p. 70) among other cases *Chicago Board of Trade* v. *United States,* 246 U. S. 231 (1918).

The Decree.

On December 23, 1929, the Court entered a Decree to the effect that "the petition herein be, and the same hereby is, dismissed upon the merits" (R., p. 73).

The Credit Rules.

Rule I recites that to correct abuses and unfair practices "which now prevail" in the motion picture industry arising out of changes of ownership of theatres for the purpose of avoiding uncompleted contracts, a credit committee of three members is to be appointed to investigate and report to the members (of the Film Boards of Trade) the names of all persons who have acquired by purchase or transfer the theatres located in the particular territory (R., p. 26, *et seq.*).

Rule III requires the members of each Film Board of Trade (whose membership consists chiefly of managers of the distributors' exchanges in the various distribution centers) to report to the secretary of the Credit Committee of the Board all "sales or transfers of theatres of which members receive knowledge". From information thus supplied the secretary compiles a "Credit Information List" which is distributed to the members of the Film Board of Trade for their confidential information. On its receipt they are required to supply to the secretary the name (if known) of the exhibitor formerly operating the transferred theatre and the contracts (if any) each member had with him. The number of pictures and the number of playing days contracted for must be stated. The members are required to give the name of the transferee, if they know it, and to state whether or not the exhibitor provided, as a condition of the sale or transfer of his theatre, for the assumption and complete performance by the new owner of the contracts so listed (*ibid.*).

Under Rule IV, it is the secretary's duty upon learning of the sale or transfer of a theatre to request the new owner to furnish to the Credit Committee within five days "information and references to enable the Credit Committee to intelligently report to the members the credit standing of such new owner". For the purpose of securing such information a questionnaire is sent out (R., p. 27; and see R., pp. 29-31).

Rule V provides that the Credit Committee shall meet at least once a week to examine and report upon the credit standing of new owners and to furnish to members for their confidential information a copy of such report.

If the transferee refuses or fails to furnish the information and references requested, the Credit Committee indicates such refusal upon the Credit Information List by placing opposite the name of the transferred theatre the words "Credit Information Refused" or, more usually, the abbreviation "C. I. R." (Rule VI).* The same rule provides for the indication on the Credit Information List of every sale or transfer of a theatre which the Credit Committee concludes, upon information received and considered, "was made by the previous owner for the purpose of avoiding or being relieved of uncompleted contracts for the exhibition of pictures at such theatre." When such a conclusion has been reached, the words "Transferred or Sold to Avoid Existing Contracts", or, more usually, the symbols "F. T.", are placed upon the List opposite the name of the theatre.

In the case of theatres classified as C. I. R. or F. T. (except where the new owner assumes the existing uncompleted contracts) the Credit Committee indicates on the Credit Information List in a column headed "Cash Security" the amount of cash security, not to exceed $1,000, which in the judgment of the Credit Committee is a reasonable sum which members shall require to be deposited as security for the performance of *future* contracts for the exhibition of pictures at such theatre. However, notwithstanding the C. I. R. or F. T. classification, security is not required on any contracts of the former owner which the new owner has agreed to assume and complete (Rule VI, R., p. 27; and see R., p. 101).

* In the case of Dallas Film Board of Trade the term "C. I. R." is used to mean either "credit information refused" or "credit information requested" (R., pp. 107, 113, *infra*, p. 49).

In determining the amount of security, the Committee is to consider the total of the rental of pictures likely to be contracted for and the frequency of possession by the exhibitor of prints of such pictures (*ibid.*).

Rule VII provides that members of the Film Boards of Trade shall not contract for the future exhibition of pictures at theatres on the Credit Information List for a period of ten days from the date of the first appearance of such theatre on the List; nor shall they contract, after the ten day period, unless the new owner has furnished to such member the amount of security specified on the Credit Information List opposite the name of such theatre.

But it is specifically provided that members may "spot book" pictures * during the period or thereafter until the Committee has reported.

The statement of this Rule on page 30 of the Government's brief is defective, as it omits one of the most vital qualifications, namely the ten-day period. We therefore quote the Rule in full in the margin.†

Whenever satisfactory evidence of the credit standing of a new owner is received, the Credit Committee removes the name of the theatre from the Credit Information List and members are no longer under the duty

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* See footnote, p. 7, *supra*.

† "No member of this film board of trade shall enter into a contract or contracts for the exhibition of pictures at any theatre listed on the credit information list for a period of ten (10) days from the date of the first appearance of such theatre upon such list nor after such period of ten (10) days unless the new owner or lessee of such theatre shall have paid in cash to such member with whom such owner or lessee desires to contract for pictures the amount of security specified on the credit information list opposite the name of such theatre.

"This rule shall not be deemed to prohibit members from 'spot booking' pictures for exhibition at any such theatre during the said ten day period or if the credit committee shall not have then reported upon the credit standing of the new owner or lessee of any such theatre to 'spot book' pictures for exhibition until the credit committee shall have so reported" (R., p. 28).

of calling for the deposit of security as a condition of making contracts for the exhibition of pictures at such theatre (see Rule VIII, R., p. 28).

Members are required by Rule IX to furnish information to the Credit Committee and in the event of violation of the Rules are subject to suspension or expulsion (Rule X).

In actual practice, the vast majority of transfers are cleared without difficulty of any kind, and it is usually only in the clearest cases of fraud that security is required for any length of time. The tendency is to apply the Rules with great leniency, particularly in view of the fact that the distributors are themselves in keen competition with each other for the business of the theatres. Moreover, there is nothing to prevent the new owner from obtaining service under the contracts existing at the time of the transfer by assuming the same, and even if he refuses to do so and refuses to give the required information, he may still obtain pictures by "spot booking" until the Committee's report and thereafter, even if the transfer is not cleared, he may obtain new contracts by putting up a small deposit.

Outline of Argument.

The position which the Appellees take in this brief is that (I) fraudulent transfers of theatres to evade exhibition contracts had become a widespread evil causing large annual losses to the distributors, the losses being generally difficult either to mitigate by fresh contracts or to recover by suit; and (II) that the effect of the Credit Rules has been not only to diminish the number of fraudulent transfers but to benefit the industry by inculcating an increased respect for contracts.

We further take the position (III) that both in the light of the decisions and in view of the way the motion picture business is carried on, the Credit Rules were reasonable trade regulations and created a form of credit protection entirely legitimate in its scope and operation, the Rules embodying a sufficient number of safeguards to prevent their restraint from being productive of hardship or inconvenience. The practical operation and effect of the Rules and the dearth of complaints will be found to corroborate the foregoing.

POINT I.

Fraudulent transfers had become a widespread evil and were causing the distributors heavy losses annually.

1. Business methods of the industry and severity of competition.

It will be a sufficient *resumé* of the method of doing business to observe that (*a*) pictures for a whole season are contracted for in a group each Spring prior to their release dates (R., p. 85); (*b*) the average exhibitor uses about 200 feature pictures a season and about 300 short subjects, news reels and comedies (R., p. 107); (*c*) the number of features produced by any one distributor is such that for a complete season's program an exhibitor contracts with from 5 to 15 different distributors; (*d*) the contract employed is standardized (R., p. 49) and provides in brief that each picture leased is leased for exhibition by the exhibitor at the theatre named in the contract, and not otherwise. *

* This latter proviso (Art. Third, R., p. 50) was required to end "bicycling", or unlicensed re-exhibition. See our brief in the *Paramount Case*, pp. 27, 46. At to the exhibitor's right to assign contracts, see R., p. 54, and *infra*, p. 42.

There were 10,500 feature productions released between January 1, 1915 and January 1, 1929, showing an average annual production of 700 features during the past fifteen years (R., p. 86). Short subject production approximated 3,000 subjects in 1928. For each of the years 1926 and 1925 the short subject production was just under 2,400 subjects (*ibid.*). There was an aggregate production of 624 news reels in 1928 by six distributors (R., p. 87). The average exhibitor uses 104 news reels in the course of a year (R., p. 86).

These figures on production emphasize the severity of the competition in the industry.

2. Frequency of transfers of theatres.

There are approximately 25,000 motion picture theatres in the United States scattered all over the country (Defts.' Ex. D, R., p. 280). Each year there are several thousand sales or transfers of theatres by the owners or operators to new owners or operators, some of the smaller theatres being sold or transferred several times in a single year. The numbers of transfers during the last three years have been as follows (Defts.' Ex. A, R., p. 278):

Year	*Number*
1926	3,438
1927	3,950
1928	4,612

The aggregate amounts involved in uncompleted contracts of the theatres transferred during the two years before the trial were as follows (*ibid.*):

Year	*Amount*
1927	$7,297,374.13
1928	9,843,970.23

The amount of rentals of the uncompleted parts of the contracts which the purchasers did not assume were $2,111,547.88 for 1927 and $4,045,857.53 for 1928.

The Government (brief, pp. 35-36) challenges the probative force of Exhibit A from which the above sets of figures were taken, on the ground that the figures, "being based on the first reports of the credit committees, are unreliable as a true picture of the situation." Now the totals of uncompleted contracts for 1928 which were not assumed ($4,045,857.53) and of uncompleted contracts for the same year which were assumed ($5,798,-112.70) are both itemized in Exhibit D (R., pp. 280-281), where separate figures for 31 out of the 32 Film Boards of Trade are shown. By virtue of the stipulation (R., pp. 134-135), we have in the record the testimony of the Secretaries of but three of the Film Boards, Dallas, Atlanta and Omaha. The figures for these three Boards (for 1928) shown on Exhibit D are:

Region	*Transfers*	*Non-assuming Purchasers*	*Credit Information Refused*	*F. T.*
Dallas	251	107	22	3
Atlanta	282	185	4	2
Omaha	328	32	7	0

These figures substantially tally with those given concerning the situation *at the end of the year* in the testimony of the respective Secretaries of the Film Boards of Trade of Dallas and Omaha, to-wit: Douglas (R., p. 90), and Miss Foley (R., pp. 130, 136).*

The conflicting answers as to the final character of the figures given by Mrs. Drazin, of which the Govern-

* The Secretary of the Atlanta Board, Cole, referred (R., p. 126) to the figures for the contracts assumed as $154,000 and those not assumed as $450,000, and, while it is not clear that he is referring to the end of the year, this seems to be a fair assumption when comparison is made with Exhibit D.

ment complains (brief, p. 37), will be found on examination (R., p. 88) to concern those transfers only in which there were assumptions of outstanding contracts. There was no ambiguity as to the finality of the figures on transfers where contracts were not assumed. It is important to note that the testimony quoted at page 37 of the Government brief to the effect that information was not called for in such a way as to show final figures was directed to the year 1927. In 1928 final figures were shown (R., pp. 138-139).

3. Why transfers cause breaches of contract.

The transfer of a theatre makes completion of uncompleted contracts impossible unless they are assumed by the new owner for the reason that each contract calls for exhibition *at the theatre which is transferred,* and as the previous owner is no longer the operator of the theatre, he no longer has the authority to arrange for playing dates at the theatre. The contract does not permit the exhibition to take place at any other theatre than that specified in the contract (see Contract, Article Second and Article Third, R., pp. 49-50).

Since in the great majority of the cases there are outstanding at the time of transfer uncompleted contracts between the seller and some or many of the distributors for the exhibition of pictures at the theatre which is transferred (Douglas, R., p. 90; Cole, R., p. 122; Foley, R., p. 131), the distributors cannot view these transfers with indifference, but are entitled to know whether the transfer was for the purpose of avoiding contracts. *

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* In 1928 out of 4,612 transfers there were only 422 transfers in which there were no uncompleted contracts for the exhibition of pictures at the theatre transferred (Defts.' Ex. A, R., p. 278). Usually there are outstanding contracts with from four to ten distributors when a theatre is transferred (Cole, R., p. 127).

It is also obvious that the distributors have an interest in getting data concerning the new owner or operator, as he will soon be doing business with many or all of them and handling their films under season contracts.

Mr. Douglas, Secretary of the Dallas Film Board of Trade, described the condition in his territory prior to the adoption of the Credit Rules, arising out of the changes of ownership of theatres. He testified (R., p. 106):

> "The condition in the motion-picture business prior to the adoption of the credit rules, arising out of the changes of ownership of theatres, was very chaotic in my territory. As I explained a while ago, I was a booker and office manager at that time. There were a number of transfers, even more than there are now. Some of these transfers, of course, were legitimate and quite a few of them were fraudulent, either for the purpose of avoiding all or part of the existing contracts or because exhibitors who could not get reductions of rentals or modifications of contracts which they thought they should have would have one of these fraudulent transfers, selling the theatre to a wife, brother, or sister, or somebody. At that time there was no bureau for collecting that information, and each distributor just relied on the information the best way he could get it."

4. Difficulty of mitigating damages.

If an exhibitor refuses to take a picture when it is released and available for exhibition, the distributor usually suffers a large or total loss of the earnings from the picture in the neighborhood or territory covered by such exhibitor's theatre. This follows from the custom

of theatres to contract for their picture programs months in advance, each exhibitor entering into contracts for the number of pictures required for a period of usually one year (Pet., part V, 4, R., p. 14). Therefore, when an exhibitor refuses to take a picture after it is released which he has contracted to take, the distributor is unable to relicense the picture in a theatre competing with that exhibitor's theatre for the reason that the available time of the competing theatre is already contracted for with other pictures. By the time the competing theatre has an open date, the picture has become an old one and no longer commands a good rental.

The damages following such a breach of contract are heavy and hard to mitigate. This factor is set forth in paragraph XI of the Answer, and was thoroughly established by testimony (R., pp. 108, 109, 129, 134). Since pictures are sold by the season, "it is very difficult to place that service with another exhibitor in that town or zone because that exhibitor has made the same contract for service as the other exhibitor" (R., p. 109).*

Mr. Douglas, Dallas Secretary, testified that it is almost impossible to salvage the contract except in certain seasons of the year (R., p. 109). He said:

> "Pictures are sold by the season and most exhibitors buy a season in advance. Every exhibitor does that, so when an exhibitor repudiates a contract it is very difficult to place that service with another exhibitor in that town or zone because that exhibitor has made the same contract for service as the other exhibitor.

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* The distributor's duty to observe the provisions of the Standard Exhibition Contract on "protection" (R., p. 50), which prevent him from licensing a second exhibition of any given picture in that locality until the lapse of a certain number of days after its previous run, operates as an additional obstacle to the mitigation of damages.

> "Another thing is that a motion picture is worth the most money when it is new. When it is first released, it is the most valuable. The older it gets the less it is worth. So if a distributor did resell a picture, it would be months after the release date and for far less consideration than that originally called for under the contract or than they expected to get under their contract.
>
> "All these conditions resulted in heavy losses prior to the adoption of the credit rules. * * *"

And see Cole, R., p. 122, *infra*, p. 23.

Placing pictures is a costly process. Frequently the smaller towns are difficult of access and it is by no means a certainty that a distributor who has become the victim of a breach of contract will succeed in making a contract with the new owner before some other distributor does so (R., p. 129; and see R., p. 134). Often the first news of a transfer of a theatre which the distributor received was from the carrier or express agent, who would notify him of the rejection of his film (R., pp. 102, 106).

The right to institute suits against exhibitors who have broken their contracts by a transfer of their theatres or otherwise is not an efficacious remedy. The secretary of the Dallas (Texas) Film Board of Trade, who had nearly eleven years experience in the motion picture business (R., p. 89), testified that in only 5% of the cases where contractors had left uncompleted contracts and given up their theatres would litigation be justified (R., p. 99).

Douglas also said: "I do not know of a single judgment that has been collected and we have had quite a few suits" (R., p. 99).

Often the transfer is made to a relative of the owner (R., pp. 103, 104, 220) or to one of the operators (R., pp.

123-124, 191-192). Of course, this is done for the purpose of giving the owner a convenient method of avoiding his obligations.

Practically all of the theatres which change hands under circumstances causing breach of contract are held by the exhibitors on leases (R., p. 99)—a further reason why judgments are difficult to collect. On this point Miss Foley testified (R., p. 131):

> "The majority of these transfers are transfers from lessee to lessee. These transfers are almost always of small theatres. There have been only a very few large theatres changing hands since I have been secretary. In the small towns it is almost always the case that the theatres are operated by men who conduct that as a side line—that is, by men otherwise engaged in other businesses. In large cities the exhibitor makes it his principal business. In the small towns somebody not connected with the film business frequently comes in on these transfers."

The futility of litigation has a direct bearing on the scope of legitimate credit protection, as we shall show *infra*, p. 41.

POINT II.

The effect of the credit rules has been to diminish the number of fraudulent transfers; the rules have benefited the industry and improved its ethics.

Since the standard exhibition contract calls for the exhibition of pictures by a designated exhibitor at a designated theatre (Standard Exhibition Contract, R., p. 49), an exhibitor by the act of transfer disables him-

self from performing the contract, unless the purchaser assumes the contract.

If an exhibitor had contracted for more pictures than he could show, and this situation had become a frequent occurrence (Opinion, R., p. 70; and see Douglas, R., p. 91), he would simply transfer his theatre to an operator or some one employed about the theatre, or to a relative (R., p. 109) and decline to accept any further pictures (R., p. 106). And he had the more audacity in so doing because he was presumably aware that litigation under such circumstances had come to be recognized by the distributors as futile (Cf. R., p. 99).

The Credit Rules have proved effective remedies for the evils they were designed to correct.

The witness Douglas testified (R., p. 109):

> "All these conditions resulted in heavy losses prior to the adoption of the Credit Rules. The *effect of the three years' operation of the Credit Rules has been to minimize fraudulent transfers.* We still have fraudulent transfers, but not in the great number we formerly did. The exhibitor now has a greater respect for his contract. I think that is the greatest accomplishment of the work of the Credit Committee." (Italics ours.)

And as to the increase in instances of assumption of contracts by purchasers, and as to the greater initial prudence displayed by exhibitors in estimating how many pictures they ought to book, he said (R., p. 109):

> "Formerly in transfers not more than five or ten per cent. of the contracts were ever assumed. In the Dallas territory now about fifty per cent of the contracts are assumed in transfers. Conditions before the establishment of the Credit Committee were such that the exhibitor did not have to

exercise a great deal of judgment in making contracts. He could make a contract for all the pictures on the market and buy three times more than he could use, and if he wanted to get out of these contracts he would perform a fraudulent transfer or do something else. Under these Credit Rules the contracts are respected and they have made the exhibitor a far more cautious and prudent business man then he was before."

The right of the distributors to demand security on new contracts in F. T. cases discourages fraudulent transfers. "When the fraudulent owner discovers he is going to have to secure the new contracts, he may elect to fulfill the existing contracts" (Douglas, R., p. 109).

Mr. Cole testified (R., p. 122):

"Prior to the Credit Rules, January, 1926, when you got a contract you did not know whether you had one or not, because exhibitors, especially among smaller theatres, were constantly changing hands. The companies paid no attention to whether it was a legitimate transfer or not and simply transferred the contracts off their books. There was so much room for fraud because a man just dumped his contracts anyhow when they sold out, and the companies lost a lot of money in the way of film rental and of expense in sending salesmen into these hick towns to get contracts [theatres in] which would sometimes change hands as many as six times a year.

"Since the Credit Committees have been operating, the small owners by a system of education have been able to see that they could transfer their contracts to the new owner without working any hardship on him and not only working no hardship on him but relieving themselves of their obligations under the contracts. If an exhibitor sells a theatre without making arrangements for taking

> care of his contracts, the old owner is still responsible for the amount of the film rental involved under these contracts."

Miss Foley testified (R., p. 132):

> "The exhibitors do not have any difficulty in obtaining pictures or contracts for pictures. If there had been such a condition, I would have been in position to observe it because every credit which is passed on comes to me. I am the one that knows it. I would be the only one who would know about it. The credit committee would not know about it without my knowing about it also, because I gather together the facts and present them to the credit committee."

The gain from the operation is not confined to the distributors. We have described (see our brief in the *Paramount Case,* pp. 6, 52-54) the manner in which exhibitors contract for rights in a particular film to be enjoyed *seriatim,* and the consequent disruption of a series of contracts following one exhibitor's breach.* Any rule, therefore, which discourages such breaches, produces a beneficial effect which is felt by all the exhibitors.

In the last analysis, therefore, the activities of the defendants complained of in this case have the effect of avoiding interruption of interstate commerce and thus promoting the free flow of commerce. Judge THACHER said (Opinion, R., p. 70):

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*"So if the exhibitor had a contract in one of these zones and attempted to repudiate the contract, the contract itself would not only be a vital loss to the distributor but it might affect other succeeding contracts with subsequent run exhibitors. We have had situations where the third run account in a town sold out or had to undergo some changes and he disrupted the situation in the entire town. It required the rewriting of every subsequent run contract in that town. The town in question was Fort Worth and affected some fifteen or twenty theatres" (Douglas, R., p. 108).

"Reasonable arrangements have been encouraged under which persons acquiring theatres for which films have been booked long in advance have assumed the performance of existing contracts, thus avoiding serious interruption of interstate trade, inherent in the old abuses."

POINT III.

The Credit Rules are normal and reasonable trade regulations.

Although the distributors have been operating under the Credit Rules since January, 1926, there is no testimony that any injury has been suffered by anyone.* This is due to the fact that the rules regulate the business of the distributors in a way tending to promote rather than to restrain legitimate trade and do not go beyond what is reasonably necessary to correct specific abuses arising out of transfers of theatres. It was proper for the appellees to endeavor by mutual co-operation to salvage something from the heavy financial losses occurring each year on account of the breaches of contracts by exhibitors who had transferred their places of exhibition. The amount of rentals of uncompleted contracts of previous exhibitors no part of which were assumed by purchasers rose from $2,111,547.88 in 1927 to $4,045,857.53 in 1928 (R., p. 279, *ad fin.*), so that the Government's assertion (brief, p. 35) that the Credit Rules "transfer certain losses from the highly organized distributor group to the largely unorganized exhibitors" seems unjustified (see *infra,* pp. 47-50). Incidentally, there is no

* Cf. Opinion, R., p. 69: "No exhibitor has complained, and no injury is shown either to individuals or to the general public."

evidence that the exhibitors were unorganized, and in view of the evidence in the *Paramount Case*, the Government's statement to the effect that the exhibitors are largely unorganized is somewhat startling.

No honest exhibitor has reason to complain of the Rules. They help to prevent dishonest exhibitors from securing unfair advantages through unfair practices. In short, only an exhibitor who is looking for an unfair or dishonest advantage, or is seeking to avoid contracts by a fraudulent transfer, has cause to object to the rules and regulations of the Credit Committees.

1. The Decisions.

In *Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918), it appeared that the members of the Chicago Board of Trade were bound by a rule known as the "Call Rule", which prohibited members from purchasing between about two o'clock in the afternoon and the opening of business the next day any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the call, which was usually over by two o'clock in the afternoon. In a suit brought to enjoin the enforcement of the Call Rule as being in violation of the Sherman Act, the Government maintained that the intended effect of the regulation was to bind members to bid a uniform price to purchase grain at country points for Chicago delivery between the close of the call and the opening of the session on the following day; that it was an agreement fixing prices during an important part of each business day and was therefore in restraint of trade, and that the necessary effect was to unduly restrict competition.

The Government further contended that most of the benefits claimed for the rule were not attributable to that part of it which the Government attacked, that is to say, the price-fixing element.

This Court, however, refused to follow the lower court in condemning the rule, saying, in effect, that every agreement concerning trade restrains trade and that the true test is whether it merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. The Court said (pp. 238-239):

> "The Government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question *the court must ordinarily con-*

> *sider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed;* the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because *knowledge of intent may help the court to interpret facts and to predict consequences.* The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that *the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.*" (Italics ours.)

The attempt of the Government (brief, pp. 32-33) to distinguish this case by minimizing the effective range of the restraint therein upheld and magnifying the scope of the restraint in the case at bar, should not succeed. In the motion picture industry, there are 25,000 theatres of which 4,612 were transferred in 1928; of these all but 422 were made while uncompleted contracts were outstanding; and yet only 175 were marked F. T. in 1928 and of these only 30 transfers remained on the F. T. list at the end of the year (R., pp. 278-279). This does not seem a broad restraint. To say the Rules "make it possible to cut off from exhibitors their entire supply of films, and for an unlimited period unless they met the conditions imposed by the distributors" (brief, p. 33) is to ignore the provisions whereby a transferee whose transfer is under investigation may get films either by spot booking, or by assuming one or more of his trans-

feror's contracts, or by putting up security, or by dealing, in some cases, with non-member distributors, and involves losing sight of the fact that no one but a fraudulent transferee or one who has refused to answer the questionnaire, is under any restraint beyond a brief period.

If the restraint in the *Chicago Board of Trade Case* escaped condemnation because of its limited field, we submit the restraint in the case at bar is no broader. But we also submit that the decision is of larger effect than the Government admits and that it is good authority for the decision in the case at bar.

In *Cement Manufacturers Association* v. *United States,* 268 U. S. 588, 604 (1925), this Court said:

> "In *Swift & Co.* v. *United States,* 196 U. S. 375, 395 [1905], this Court approved a decree which provided that defendants should not be restrained 'from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers'. Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud."

There are two District Court decisions under the Sherman Act in which the validity of credit rules was recognized.

In *United States* v. *King,* 229 Fed. 275 (D. Mass., 1915), the Court said (p. 278):

> "Persons have a right to associate for the purpose of advancing their own interests by discriminating against other persons, if such discrimination is based upon proper and legal

> grounds, e. g., failure to pay bills due to members of the association (Brewster v. Miller, 101 Ky. 368, 41 S. W. 301), and is not merely coercive and arbitrary, as in Martell v. White, 185 Mass. 255, 69 N. E. 1085; nor for the purpose of restraining interstate trade, as in Eastern States Lumber Association v. U. S., 234 U. S. 600."

In *United States* v. *Fur Dressers' & Fur Dyers' Association, Inc.*, 5 F. (2d) 869 (S. D. N. Y., 1925) the members of the Association had agreed that they would not do business save on a cash basis with dealers who had not discharge their overdue debts to the wholesalers, the members of the Association. In dismissing a petition under the Sherman Act, Judge BONDY said (p. 873):

> "The association simply regulated business of its members in a way tending to promote, rather than restrain, legitimate trade. Nothing that the association did or could do under its by-laws was injurious to any of its members or the public. No one, except a person looking for an unfair or dishonest advantage, could object to its regulations."

The Government purports to distinguish this case by saying (brief, p. 34) that the rules in the *Fur Dressers Case* "applied against delinquent debtors, whereas here the rules are applied against those not in any default on their contractual obligations." But, as we have observed, the Credit Rules are directed against transfers made for the purpose of avoiding uncompleted contracts, to persons who are almost certainly in collusion with the transferor.* The transferees at whom the Rules are

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*Cf. Opinion, R., p. 71: "The purchaser, who must be assumed to have knowledge of the business upon which he is about to embark, almost certainly knows that any going theatre has such contracts outstanding, and that the conveyance of the theatre without any assumption of these obligations will necessarily result in their breach."

aimed may not have defaulted on their own contracts, but they are aiders and abettors of those who have.

The principle that concerted action against delinquent debtors is not actionable and that, as a result, to include a man's name on a circulated list of such persons may not be made the basis of an action for libel if he is in fact delinquent, was sustained in the following cases:

Putnal v. *Inman*, 76 Fla. 553, 556, 80 So. 316 (1918);

Brewster v. *Miller's Sons Co.*, 101 Ky. 368, 381, 41 S. W. 301 (1897);

Reynolds v. *Plumbers' Protective Assoc.*, 30 Misc. (N. Y.) 709, 712, 63 N. Y. Supp. 303 (1900);

Delz v. *Winfree*, 6 Tex. Civ. App. 11, 25 S. W. 50 (1894);

Woodhouse v. *Powles*, 43 Wash. 617, 621, 86 Pac. 1063 (1906).

In *Putnal* v. *Inman* (*supra*), the legality of delinquent debtors' lists was brought up in an action for libel; the Court denied a recovery on the ground of privilege, saying (p. 556):

> "In order that merchants may prudently do a credit business, it is expedient for them to know those in the community who meet their obligations promptly and those who do not, and they have the right to organize and enter into mutual agreements, for the purpose of giving each other the benefit of their knowledge on these subjects, and a communication made by a member of the association to the other members, is privileged, if made in good faith and in such a manner and on such an occasion as to properly serve the purpose of the association."

In this case, the plaintiff was improperly listed as delinquent. Nevertheless a judgment for the plaintiff was reversed, the proof establishing that the list was not shown to any persons except members of the Association. The Court was careful, moreover, to point out the fact that this scheme was (p. 554)

> "not the same as blacklisting or boycotting by refusing to trade with him, but is only an agreement not to extend him credit without assuming whatever indebtedness he may owe to any other member of the association."

In *Delz* v. *Winfree* (*supra*), the Court sustained an agreement among defendants to refuse to do business on any terms with a debtor. The plaintiff, who was a butcher, charged conspiracy against three concerns, alleging that they conspired to refuse to sell to him live stock and to ruin his business. The defense was that the plaintiff was indebted to them and for that reason they refused to sell. The Court held that it was proper for the defendants to agree that neither of them would sell to the plaintiff when he was indebted to any one of the defendants, saying (pp. 14-15):

> "We conclude from the evidence that there was an agreement between the defendant firms that neither of them would sell animals for slaughter to any butcher who was indebted to the other, if the latter so requested; and that in pursuance of this agreement both of said firms did refuse to sell to plaintiff, and that thereby his business was rendered much less profitable. That the agreement between the defendants, that each firm would refuse, upon the request of the other, to sell to any butcher who might be indebted to the latter, was not made with special reference to plaintiff, and

that the same was made by defendants for their mutual protection against dishonest and insolvent customers, and for the purpose of compelling such customers to pay their debts due the defendants, or either of them, and not with the intention to injure plaintiff or any other butcher in his business.

* * * * * * *

"It would seem, therefore, that since each of the defendants had the unquestionable right to refuse to trade with the plaintiff, or any other butcher who might desire to buy from them live animals, that *the defendants without malice to any one, and for the lawful purpose of protecting each other from dishonest or insolvent customers, and otherwise mutually assisting each other in the conduct of their business, might agree that each upon the request of the other would refuse to deal with any butcher.* Cooley on Torts [1879], 125; Delz v. Winfree, Norman & Pearson, 80 Texas, 400 [1891], and authorities therein cited." (Italics ours.)

a. *The cases cited by the Government are distinguishable.*

The Government's invocation (brief, pp. 21-23) of the type of case illustrated by *Eastern States Lumber Association* v. *United States,* 234 U. S. 600 (1914), *Montague & Co.* v. *Lowry,* 193 U. S. 38 (1904) and others, proceeds from a misconception of the purpose of the Credit Rules. They were not designed to shift losses caused by breaches of exhibition contracts from the distributors to the transferees of theatres, but were designed to make more difficult and less frequent transfers where the established purpose of the transferors was "to evade their contractual obligations by colorable transfers of title to their theatres" (Opinion, R., p. 66).

In the cases cited by the Government to uphold their contentions, the concerted action where condemned was directed towards an unlawful object. Thus, in *Eastern States Lumber Assoc.* v. *United States, supra,* the object of the conspiracy was to prevent wholesalers from selling directly to the customers of retailers; in *Montague & Co.* v. *Lowry, supra,* the result was to narrow the market and enhance prices; in *Loewe* v. *Lawlor,* 208 U. S. 274 (1908), the object was to boycott the plaintiff's goods in order to compel him to unionize his shop; in *Binderup* v. *Pathé Exchange, Inc.,* 263 U. S. 291 (1923), the charge was that certain distributors from whom the exhibitor had refused to buy induced the other distributors to cease dealing with him, and that they all then combined to prevent him from carrying on his business, the direct result of the alleged conspiracy not to sell to the exhibitor being to put an end to his participation in that business; and in *Anderson* v. *Shipowners Assoc.,* 272 U. S. 359 (1926), insufficient reasons were shown for the necessity of the concerted action regulating the employment of seamen.

In Sherman Act cases it is always proper to see whether the contract or combination assailed has any "main lawful purpose, to subserve which partial restraint is permitted * * *". *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 283 (6th Circ., 1898), modified and affirmed 175 U. S. 211 (1899). The *Swift Case* and the *Chicago Board of Trade Case,* as well as the other cases cited *supra,* pages 26-32, show that "to protect the defendants against dishonest or irresponsible" debtors is a purpose of recognized legitimacy.

The Government argues (brief, p. 27) that the line of demarcation between illegality and legality, as indicated

by the decisions of this Court, is whether there is an actual or implied agreement for concerted action, or whether there is complete freedom of individual action. One would have thought that in view of the decision of this Court in the *Chicago Board of Trade Case* no such argument would be seriously urged.

2. Reasonable measures against losses by fraudulent debtors are forms of credit protection.

The fair measurement of a credit risk in any business is the power and capacity of the debtor to cause damage to the creditor. If the damage ensuing upon a breach is not confined to the sums payable as rent on films but may far exceed this sum, the credit extended in dealing with an exhibitor must be measured by such larger sum.

The Government in effect argues that the meaning of the word "credit" is confined to capacity to pay and that questions not directly relating to such capacity are not proper questions in an investigation of a man's credit. On the contrary, in the motion picture business, it is not the amount of money the exhibitor has in the bank which determines his rating as much as his moral responsibility—his capacity to realize that the performance of an exhibition contract involves not only paying money but doing things, *e. g.*, forwarding films, in accordance with his undertaking.

It is likewise clear that his disposition to avoid defrauding distributors and to continue the existing contracts, which license exhibitions at the theatre acquired and at no other, is a factor inseparably connected with his moral responsibility and his credit.

The definition of the word "credit" as used in commerce is stated in Webster's New International Diction-

ary as follows: "Trust given or received; expectation of future payment for property transferred, or *of fulfillment of promises given;* the relation existing between one person and another who trusts in him to pay or *render something in the future;* mercantile reputation *entitling one to be trusted.*" (Italics ours.)

Miss Foley, Secretary of the Omaha Film Board of Trade, said (R., p. 134):

> "An exhibitor may not have a great deal of money in the bank but he may become a very good exhibitor. He can operate his theatre and be able to pay his film rentals. * * *
>
> "Whether or not an exhibitor is going to observe his contractual obligations is what we are interested in; that is the thing we are looking into. Those are the questions that affect credit in the motion picture business not the amount of money in the bank, because contracts are made calling for a large number of pictures and these contracts are all made at the beginning of the year and the producing companies base their figures on the amount of money they are planning on those contracts as revenue. If that money does not come in from those contracts they lose their money. It is very difficult to replace contracts."

It must be borne in mind that the practice of granting protection to exhibitors (described *supra,* p. 19n.) results in the distributors depending upon the particular exhibitors with whom they have a contract for their entire revenue for those pictures from that particular locality.

Furthermore, failure to perform will disorganize the playing arrangements with the exhibitors having subsequent rights (R., p. 108, *supra,* p. 24).

Information bearing on the likelihood that the exhibitor will perform *all the terms* of his contract is therefore legitimate credit information, and Credit Rules and Credit Committee functions which deal with the collection of such information and with the consequences of an exhibitor's failure to furnish it, are, we submit, Credit Rules properly so-called, and lawful under the authorities. To say, as the Government does (brief, p. 27), that the Credit Committees' operations were for a purpose "entirely divorced from the question of credit standing" is to overlook the fundamental principles and practices of the motion picture industry (R., pp. 84-86).

It would be a rather surprising doctrine to the business world if financial losses due to fraudulent transactions of customers were not considered as matters affecting credit.

a. *The questionnaire is legitimate.*

Prior to the adoption by the defendant distributors of the Credit Rules about January, 1926, the distributors had no adequate means of securing knowledge of the fact that a theatre had been transferred. Mr. Douglas testified (R., p. 102):

> "In a great many cases prior to the formation of the credit committees one of the usual ways in which the distributor heard about a transfer was through the rejection of the film when it was sent out to the country. Very seldom did we ever receive notice of a change of ownership, fraudulent or otherwise."

And see to the same effect R., pp. 106-107.

The distributors were equally without means of obtaining pertinent information relative to a new owner

or operator of a theatre. In the event of the transfer of a theatre which is likely to occur in a remote town, there was at that time no bureau of information or office from which a distributor could obtain information on pertinent matters, such as the number and status of uncompleted contracts, the previous experience, if any, of the new operator, in the motion picture business, which, if any, of the uncompleted contracts he intended to assume, his financial standing, the condition of the projection equipment, seating capacity, policy of the theatre, that is, whether it shows vaudeville, number of days open each week, admission prices, time of first performance, name of person, firm or corporation operating such theatre, name of person authorized to sign contracts, and whether the theatre was owned or leased.

All the foregoing matters and others are covered by the questionnaire (R., pp. 29-30). Is it not a reasonable requirement to ask the new operator to fill out the questionnaire?

One of the defendants' exhibits gives the number of instances in which credit information was refused (Defts.' Ex. A., R., p. 278). In 1928 there were 974 cases in which credit information was not given at the first request, but during the year, the large majority of these furnished credit information, so that at the end of 1928 only 183 names remained on the C. I. R. list. There were 611 transfers in 1926, and 510 in 1927 in which credit information was not given in the first instance (R., p. 279). Doubtless many of these later furnished credit information.

Substantial compliance with the questionnaire is all that is called for (Douglas, R., p. 107; and cf. Cole, R., p. 127).

If the new owner has assumed all contracts, he is not required to submit the questionnaire. If he is willing to assume the contracts for exhibition at the theatre which he is acquiring and under which the distributor has obtained rights prior to the new owner's acquisition of the theatre, there is a fair presumption that the new owner will have respect for the contract which he expressly assumes. One who so assumes contracts is generally honest.

Nevertheless, "many new owners are accepted as responsible who do not assume the contracts" (Foley, R., p. 131). And it is not necessarily a bar to acceptance of the new owner that at the time of transfer the transferor was in default on an award (Douglas, R., p. 115). The distributors may prefer to "take a chance" on the new owner rather than on the irresponsible former owner (*ibid.*).

The information required by the Credit Committee is confidential and is disclosed only to members of the Film Board of Trade (Rule III, R., p. 26).

Mr. Douglas testified regarding the facts considered by the Dallas Committee (R., pp. 107-108):

> "We are particularly interested in knowing if the purchaser is going to assume and fulfill the existing contracts, for the reason that in the smaller towns particularly there are always 150 to 200 pictures under contract. Sometimes all of them are dated for future exhibition, possibly six, eight, or ten months in advance. We want this credit information, and we want a declaration from the purchaser to know whether or not the contracts are going to be performed, so that we can notify the creditors whether they shall continue to reserve his dates or withhold them and try to place them with some other exhibitor.

"That information is necessary to salvage a contract either in the same town, or if the date is not going to be respected it may be withdrawn and an attempt made to put the picture and print in some other town. Otherwise the print would remain in the distributor's vault and not earn any revenue and be a dead loss.

* * * * * * * * * *

"When the members receive a credit report they know what disposition is to be made of their existing contracts, and this is very vital to them. If the purchaser says he is going to assume the contracts, the members understand the pictures will be taken and they continue to reserve the bookings, which in the contract are for the benefit of the purchaser. If the purchaser says he is not going to assume the contracts, the members usually cancel the dates."

Two questions asked on the questionnaire have a bearing upon credit more direct than may appear on first impression. One of these is to give the names of theatres theretofore conducted. This reflects on credit because an inexperienced exhibitor may overbuy (*i. e.*, lease more films than he can show), or may damage prints, or fail either to return them promptly to the exchange or forward them to the next exhibitor; furthermore, if a new owner has been in the business before, some member of the Credit Committee or the Board Secretary may know about his reputation (R., p. 107). The other question is whether the theatre is owned or leased, and if the latter when does the lease expire.*

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* Miss Foley testified (R., p. 130) that the Credit Committee asks the new owner for the bill of sale or lease. If he will not submit it then they try to get the bill of sale from the old owner or any agreement he may have with the new owner. "The majority of these transfers", she added (R., p. 131), "are transfers from lessee to lessee."

Mr. Douglas said (R., p. 99): "Practically all of these theatres changing hands are lease propositions. The theatres in small towns where purchasers are reported, or they claim they are purchasers, are nothing more than lessees." And see R., pp. 103, 124.

The questionnaire also asks whether the purchaser has assumed or will assume the seller's contracts. Information of this nature is rightly regarded as credit information because a purchaser indicates by his willingness to take over these contracts that he is a man who would take care of his obligations. Furthermore, such information is essential in connection with the distributors' mitigation of damages. They have to know whether "to continue to reserve his dates or withhold them and try to place them with some other exhibitor" (R., pp. 107-108).

For the losses caused to the distributors by transfers, litigation was, as we have seen (*supra*, p. 20), an ineffective remedy. Hence the "obvious business task" (to employ the language of the Opinion, R., p. 71) was to persuade the new owner who was continuing the business to make a fair adjustment,—in other words, to assume the old contracts, or at least undertake a partial assumption by way of a fair adjustment.*

We submit that Judge THACHER gave a clear and fair account of the situation when he said (R., p. 71):

> "If it be said that such a purchaser is under no legal obligation to assume the improvident contracts of his predecessor in title, it may be answered that the willingness of men to deal with one another is properly influenced by an expectation of fair dealing without insistence upon the pound of flesh, and that one not disposed to attempt to reach fair adjustments cannot fairly demand from those who are injured new contracts without some security. The defendants' agreement to demand security was fully justified by their common interest in preserving the integrity

* "Distributors, it appears from the evidence [R., pp. 95, 104, 115, 116, 131], were always willing to meet the exhibitor's business necessities to scale down the contract requirements and, if desired, to substitute pictures [R., pp. 91, 131] for those contracted for" (Opinion, R., p. 71). And see the *Lytton Theatre Case* described in the Appendix, *infra*, p. 63.

of contractual obligations owing to them by others. Such restraints as may have resulted from what was done were incidental to this legitimate purpose, and therefore not unreasonable or unlawful" (Opinion, R., p. 71).

3. The ten-day period of investigation during which the new owner may "spot book" pictures prevents any unreasonable inconvenience to him.

When news of a transfer has been received, a questionnaire is sent to the new owner (Rule IV). For the next ten days, while distributors will serve him on contracts of the old owner assumed by him or assigned to him with his consent (R., p. 54), they will not make season contracts with him, but will "spot book" pictures for exhibition at his theatre (R., p. 127). This enables him to keep his theatre open. And see R., p. 132. If the questionnaire is not answered, the new owner is listed as C. I. R. (credit information refused)*; if the answers show circumstances indicative of fraud, the new owner is listed F. T. In such case, orthodox status is withheld; but even then he may get pictures by putting up security, or by assuming one or more of his transferor's contracts, no security being called for, or, in some cases, by dealing with non-member distributors.

The distributors generally were willing to scale down the number of pictures, or to revise prices downward, or to substitute new pictures for old in an endeavor to meet the requirements of the new owner (R., pp. 91, 95, 97, 104, 115, 116, 131, 135, 136). Judge THACHER's finding to this effect (R., p. 71) is a persuasive practical answer to the Government's contention (brief, p. 35) that the Rules may be used "to impose on the new owner the unsuccessful policy of his predecessor."

Douglas said (R., p. 109):

* For an exceptional definition prevailing at Dallas, see p. 49, *infra*.

> "That provision or agreement with respect to security does not tend to cut off the supply to the purchaser. If he does not want to put up security, service is always continued on existing contracts or whatever contracts he is willing to take" (R., p. 109).

The question is, does the interposition of the ten-day period of investigation seriously inconvenience the innocent transferee?

We may leave to one side the exceptional case of the purchaser who has arranged for a supply of pictures before taking over the theatre (Douglas, R., p. 108).

If the purchaser has not arranged for his pictures in advance of purchase, it works no hardship on him to ask him to wait ten days before he makes contracts. In the ten-day interval, and indeed for a considerable period thereafter, the custom of the trade (R., pp. 85, 109, 120) is such that spot-booking is no mere makeshift but is the natural way to take care of immediate requirements. And it must not be overlooked that the new owner often makes selections from the uncompleted contracts of his transferor and assumes one or more of them without depositing security under any of them (*supra*, pp. 28, 29, 41, 42; Douglas, R., pp. 101, 109).

Mr. Douglas testified (R., p. 108):

> "In some cases the purchasers of theatres come in to see me or the credit committee before the purchase and arrange for their pictures in advance. We try to encourage them to do that.
>
> "During the period of investigation the purchaser may continue service on the existing contracts. If the former owner had pictures dated, the distributors are not going to suspend the service or cancel those dates until they are told to do so, either by the former owner or the purchaser. So the purchaser may either continue the service on those contracts or he may spot book on his

> own account until the credit report is passed upon by the committee."

Moreover, the Rules do not prevent, from the start of the ten-day period, adjustments between the distributor and the new owner of the uncompleted contracts of the previous owner.* That is a matter between the distributor and the exhibitor (R., p. 106). Douglas testified (R., p. 104):

> "There is nothing in our rules to prevent a distributor adjusting a contract of the previous owner with the new owner. It is done all the time."

Mr. Cole, Atlanta secretary, testified (R., p. 127):

> "During the spot booking period any new owner always can take pictures under any of the contracts of his predecessor. He can assume any one or all of those contracts without any security whatsoever. In our territory he can not only assume any one of the contracts but he can assume any portion of any one of the contracts that he wants to. For instance, if Universal has 40 features, 42 comedies, 42 news reels, he may say, I will take the features but I don't want the news and the comedies, and we will let him take the features, thus salvaging all that we can."

Mr. Douglas testified to the same effect (R., pp. 101-103).

Miss Foley testified (R., p. 131):

> "Under the rules in our territory members are permitted to adjust uncompleted contracts of the previous owner with the new owner and they do so. In our board the members are permitted to re-

* See the excerpt from the Opinion (R., p. 71), quoted in the footnote, *supra*, p. 41.

write contracts even; if the exhibitor comes in and the distributor will sell him a new contract the old contract goes out and a new contract may be sold to him for the same number of pictures or a lesser number, with possibly a different rental and different pictures. We do not allow the members to sell more than they have under the contract with the old owner. If they had 50 features and 50 comedies, they could not sell to the new owner more than 50 features and 50 comedies. The amount of revenue does not enter into it.

"If the man needs more pictures, he will have more than one contract to assume. I spoke of just one contract; no doubt there will be four or five contracts. If he assumes all the old contracts then the matter goes out of our hands if the new owner has submitted credit information and his credit is established. Many new owners are accepted as responsible who do not assume the contracts."

4. The rule requiring security of a transferee of a theatre where the transfer is listed as fraudulent, or where credit information is refused, is reasonable and does not occasion any hardship.

The Rule requiring the defendant distributors to demand security of a new owner or operator of a theatre who has been listed as F. T. is being observed by defendants reasonably and fairly, and without occasioning hardship to any one (R., pp. 70, 131-132). It enables the distributors to salvage by fair means some part of the uncompleted contracts. The vast majority of new owners are given favorable credit ratings promptly (Defts.' Ex. A, R., p. 278).

Mr. Douglas defined an F. T. transfer as follows (R., p. 109):

> "We consider a fraudulent transfer is one where the party is selling his theatre, usually to an operator or someone employed about the theatre, or particularly a relative, for the purpose of avoiding either an arbitration award or for the purpose of avoiding the fulfillment of his existing contracts."

See also Rule VI (R., p. 27).

In determining the amount of security, not exceeding $1,000, to be demanded, the Credit Committee considers such facts as are pertinent and helpful in reaching a fair and reasonable conclusion. The Rules provide on this subject (R., p. 27):

> "The credit committee in determining the amount of such security shall consider the total of the rental of pictures likely to be contracted for and the frequency of the possession by the exhibitor of prints of such pictures."

Moreover, it is to be remembered that an F. T. rating is not a permanent rating. Rule VIII provides that the Credit Committee may from time to time upon satisfactory evidence of the credit standing of any new owner, remove from the Credit Information List the name of the theatre owned or operated by such new owner, and in such case the members of the Film Board of Trade are free to contract with such new owner without requiring the new owner to deposit cash security as a condition for the making of a contract (R., p. 28).

It should be remembered that while the limit of security is placed at one thousand dollars, it is extremely rare for any such amount to be required. The amount of

deposit usually required is usually small, ordinarily from $50 to $200, although sometimes it is higher (Cf. R., pp. 100-101).

That the operation of the Rules is concentrated on the fraudulent transfers, is evidenced by the fact that the number of cases reported as F. T. is far less than, and exhibits no relation to, the number of cases where purchasers have not assumed any part of the uncompleted contracts. If it had been the intention of the appellees, as charged by the Government, to coerce purchasers into assuming uncompleted contracts, the number of F. T. cases should approximate the number of purchasers refusing to assume any part of the uncompleted contracts of previous exhibitors.

The transfers reported as fraudulent transfer for 1927 and 1928 were as follows (Defts.' Ex. A, R., p. 279):

1927	212*
1928	175†

The number of purchasers refusing to assume any part of uncompleted contracts of previous exhibitors were (Defts.' Ex. A, R., p. 278):

1927	1,237
1928	1,653

While the Government claims unfair results are possible, the results are shown to be quite the opposite in fact.

There is a statement in the Record showing in regard to each Film Board of Trade for 1927 and 1928 the number of (1) theatres, (2) transfers, (3) purchasers refus-

* Many of these were cleared during 1927, but figures are not available.
† During the year 145 of these were cleared, so that only 30 remained on the F. T. list at the end of 1928.

ing to assume any part of contracts, (4) purchasers assuming all or part of contracts, (5) amounts involved, (6) favorable credit ratings, (7) cases in which credit information was refused, and (8) cases reported as "fraudulent transfer" (Defts.' Ex. D, R., p. 280). An examination of this exhibit discloses that *in the great majority of cases the number reported as fraudulent transfer bears no relation to the number of purchasers refusing to assume any part of contracts.* For instance, to take the first Board, Albany, the number of transfers in 1927 was 48, and in 1928, 65. In each year 21 purchasers refused to assume any part of the contracts. In each year there was no case which was reported as a fraudulent transfer in Albany (*ibid.*).

In Atlanta, out of 102 transfers in 1927 and 282 in 1928, 43 purchasers in 1927 and 185 in 1928 refused to assume any part of contracts; but in 1927 only 8 cases were reported F. T. on the first report and in 1928 only 2 at the end of the year (R., p. 124).

In Dallas, out of 85 in 1927 and 107 in 1928 who refused to assume any part of contracts, 10 were reported F. T. on the first report during 1927 and only 3 or 4 at the end of 1928 (R., p. 90).

The Government maintains (brief, p. 35) that the aim of the Credit Rules was to shift losses from distributors to transferees of theatres and not (as the appellees maintain) to reduce the number of fraudulent transfers.

The results show an increase in losses suffered in 1928 over 1927 and a decrease in fraudulent transfers. The contention of the appellees is borne out by the results; that of the Government is not.

The Government's attitude seems to be that the small number of F. T. ratings has little significance. This, of

course, entirely overlooks the deterrent effect of the Credit Rules. The Government also intimates (brief, p. 15) that the Credit Committee might list security, although there were no F. T. or C. I. R. ratings and that the only credit information list in the record (R., p. 277) uses the code letters "C. I. R.", "F. T.", "Pndg." and "O. K.", and that the letters "O. K." are there defined as transfers where all contracts have been assumed, or the credit of the new owner is O. K., or is O. K. with security as recommended. It will be noted that the references are all to the Dallas Film Board of Trade. This being a very large territory, the Dallas practice differs in some respects from that in the other localities. Salesmen are permitted to secure applications during the ten-day period, although no definite action is taken on the application until the status is passed upon (R., p. 117). Transfers are marked C. I. R. from the beginning, meaning "credit information requested" (R., pp. 107, 113). Mr. Douglas testified that the Dallas Board interprets that to mean either "credit information requested" or "refused" (*ibid.*). When a theatre is marked "O. K." with security deposit recommended, the credit questionnaire has been completed and all requirements for establishing credit have been satisfied (R., p. 117). But the security provision is in this case a recommendation only (R., p. 116).

The Court asked Mr. Douglas certain questions (R., p. 100):

> "Q. The Government seems to assert that there was an intention of these parties to compel the assumption of the prior contracts; what have you to say about that?

"A. You can take most any of these cases and you will observe the deposit is usually a maximum of $50. In most cases there are $3,000 or $4,000 worth of contracts involved. I do not think that recommending a $50 deposit on a contract with a distributor would coerce the purchaser into assuming a $3,000 or $4,000 contract. It would be a lot better judgment and more sensible to place a $50 deposit with two or three exchanges rather than obligating himself to $3,000 or $4,000 worth of burdensome contracts, if they were burdensome."

In the Dallas territory, where there are 1,072 theatres and fifteen members of the Film Board of Trade (R., p. 90), not more than $1,000 is held by distributors from all the theatres in the territory as deposits on recommendations of the Credit Committee (R., pp. 102-103). The deposit is generally released before the contract is terminated (*ibid.*). This hardly seems to justify the Government's characterization of the deposits (brief, p. 25) as "an insurmountable burden to the average small exhibitor."

In the case of C. I. R. transfers, the fact that exhibitors were frequently given the alternative of putting up a $50 deposit, or assuming contracts amounting to $3,000 or $4,000 (R., p. 100) forbids the inference that the assumption of contracts was the primary or dominant motive behind the Credit Rules. On the contrary, what is shown is an application of Credit Rules to credit purposes without undue enhancement of the deposit called for.

The record shows that there were 294 transfers of theatres in the Dallas territory in 1928. The new owners in 107 cases did not assume the existing contracts. Of

these 107, 17 were reported as F. T., 13 of which were cleared during the year, so that only 4 remained on the F. T. list at the end of the year. While 40 or 50 refused to give information on the first request, most of them gave the information before the end of the year (R., p. 90). The fact is, one cannot read the testimony of Mr. Douglas (R., pp. 89-122) without being satisfied with the fairness shown by the Dallas Film Board of Trade and with the fact that the requirements were such only as might reasonably be expected in dealing with delinquents.

In any event, it should be noticed that the points made by the Government on this particular subject relate only in fact to the Dallas territory, as the practice differs there from that prevailing elsewhere (R., pp. 117, 127).

5. The actual application and effect of the Credit Rules in practice, and the absence of complaints, show the Rules to be fair and reasonable.

In operation the Rules have often been fairly employed as a basis for negotiation with a view to equitable adjustment of the interests of all concerned, and the results have been clearly beneficial to the industry. No exhibitor has complained, and no injury is shown either to individuals or to the general public. The District Court so found (R., p. 69).

It is a fair presumption (and the Court so held [R., p. 71]) that any one who purchases a going theatre must be aware that there are in existence contracts for the exhibition of pictures at that theatre which will be broken by the conveyance unless he assumes them. In fact, the act of purchasing a theatre without assuming contracts

falls but little short of a tortious interference with contractual rights. In most cases where the sale is made to the seller's wife or brother or close relative, or to one of his operators or his manager, it is perfectly obvious that the transferee is allowing herself or himself to be used for the purpose of assisting the seller in breaking his contractual obligations. A purchaser who takes no thought for the existing uncompleted contracts of the seller of which he has knowledge, but who repudiates them, cannot be heard to complain of rules whose purpose is to ascertain whether in fact the transfer has been made in good faith, or is a step in a scheme on the part of the exhibitor to avoid his contractual obligations.

It seems clear that there has been no suppression of competition. In fact, in the territory covered by the Dallas Film Board of Trade, "there are now about 200 theatres more than there were when the Credit Rules were adopted" (R., p. 109). In fact, in the country at large, according to Exhibit D, the number of theatres in 1928 had increased by more than 1,400 over those in 1927.

It is also significant that, in the words of the Opinion, "no one has complained except the Government. No injury to individual traders or to the public generally is disclosed" (R., p. 70). And Miss Foley, Secretary of the Omaha Film Board of Trade, testified (R., pp. 131-132):

> "I have not seen any hardship worked upon any exhibitor in our territory by reason of anything in the credit rules."

And see Cole, R., p. 122, quoted at p. 23, *supra*.

Failure of the Government to prove injury was properly accorded significance by the Court below. A similar attitude was taken by Judge Bondy in *United States* v. *Fur Dressers' & Fur Dyers' Association, Inc.*, 5 F. (2d) 869, 873 (S. D. N. Y., 1925), *supra*, p. 30. And it seems

clear that such an attitude has the sanction of this Court, as well. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 448 (1920).

The Government says (brief, p. 16) that the Rules do not apply to the owners of newly constructed theatres, but, of course, the reason for this is that the evil intended to be reached by the Rules arose out of transfers of existing theatres and not out of the construction of new theatres. The Government also puts the case (brief, p. 16) that a new owner may be cleared even though he has a notoriously bad credit reputation and has not furnished the information requested by the Credit Committee. This, of course, is extreme and is only supported by an assumption by examining counsel (R., p. 128), not based on any actual case shown by the record.

By way of further illustration of the practical operation of the Credit Rules and of the type of case dealt with by the Credit Committee, we have set forth in an Appendix (*infra*, p. 58) a digest of some typical F. T. cases.

POINT IV.

The District Court properly held that there was no proof of the supplemental agreements described in the petition.

The Petition alleges that the members of the Film Boards of Trade, that is the branch managers of the distributors, entered into agreements which supplemented and exceeded the Credit Rules (R., p. 23). This allegation of the Petition is weakened by the further averment that the members entered into such supplemental agreements "*without the knowledge and against the general*

instructions of the defendant distributors and of the defendant association" (ibid.).

These alleged supplemental agreements were (*a*) to refuse to make new contracts unless the new owner assumed the performance of uncompleted contracts; (*b*) to retain on the Credit Information List the names of new owners who had not assumed uncompleted contracts; (*c*) to refuse to "spot book" prior to the Credit Committee's report; and (*d*) to require new owners to deposit security on every contract (R., p. 24).

The existence of these supplemental agreements was denied by each of the three secretaries who testified. Messrs. Douglas and Cole have attended all meetings of the Credit Committee since the Rules were adopted in January, 1926 (Douglas, R., p. 90; Cole, R., p. 123), and Miss Foley has attended all meetings since August, 1927 (R., p. 130).

Mr. Douglas made his denial specific in respect to each form of agreement (R., pp. 110-111). He also denied that there was any agreement between the members to coerce exhibitors to assume uncompleted contracts.

Mr. Cole testified to the same effect (R., pp. 124, 125). He also denied the existence of any agreement between the members of the Atlanta Board to coerce exhibitors to assume contracts. He said that the figures would substantiate his denial better than anything he could say. Only 25 per cent. of the rentals on uncompleted contracts were assumed by the new owner in the territory of the Atlanta Film Board of Trade. $154,000 of contracts were assumed as against $450,000 not assumed (R., p. 126).

Miss Foley testified that she had heard the testimony of Mr. Douglas and Mr. Cole about the alleged supplemental agreements, and that her "testimony is the same

as theirs" (R., p. 136). She said that there were no such supplemental agreements in her territory. There had been no conspiracy to coerce purchasers of theatres to assume uncompleted contracts (*ibid.*).

The force of the foregoing testimony was not overcome by the testimony that the Dallas Film Board of Trade (which was in many respects a law unto itself [R., p. 117])* recommended security in certain cases not strictly classifiable as F. T. or C. I. R. Mr. Douglas emphasized the fact that it was a "recommendation" only, which the distributors were free to act upon or not as they chose (R., p. 114); hence it

> "cannot be held to be an unlawful restraint upon commerce, even though in the ordinary course of business most sellers [distributors] would act on the information * * *". *Cement Manufacturers Assoc.* v. *United States*, 268 U. S. 588, 604 (1925), quoted in the Government brief, p. 29.

Incidentally, the eighteen instances of such "recommendations" listed on page 15 of the Government brief were culled from the files of the Dallas Film Board of Trade covering a period of two years and four months (R., pp. 182-227).

Mr. Douglas categorically denied (R., p. 110) the making in his territory of any supplemental agreements of the type alleged in the Petition.

The testimony amply supports the holding of the District Court (R., p. 69) that the allegations concerning the supplemental agreements were not sustained.

---

* "When a theatre is marked O. K. with security deposit recommended, the credit questionnaire has been completely filled out, and it satisfies all the requirements of establishing credit. Under those circumstances there is no provision in the rules, aside from fraudulent transfers, allowing that security to be required. That again is a practice adopted by the Dallas board. That practice of using the credit committee procedure and the credit information lists is one established individually by the Dallas Film Board of Trade" (R., p. 117; and see p. 49, *supra*).

Summary.

The real burden of the Government's contention seems to be that the distributors should have sat down and permitted fraudulent transfers to continue unabated with consequent heavy losses to themselves. Thus, the Government brief: "purchasers in many cases would *voluntarily* assume" (p. 38); "even where contracts were not assumed the distributors involved could place their films in other theatres" (p. 39); "taking the distributor group as a whole, the effect of non-assumption of contracts is largely a shifting of business among the distributors" etc. (p. 39)*; "some loss from failure to fulfill contracts is an element of every business" (p. 39); "they might merely have circulated among their members whatever information the Board secretaries might obtain" etc. (p. 39). We submit that when those commonly interested are faced with financial losses due to a definite evil, they may combine to require reasonable security for their fragile and valuable property before placing it in the hands of those who have shown their willingness to be parties to a fraud.

The Credit Rules were rightly upheld by the Court below because they are reasonable in their terms and operation, injure no one, have a predominantly ethical aspect and were a proper measure of protection against exhibitors whose aim was to evade their contractual obligations by colorable transfers of title to their theatres (Cf. Opinion, R., p. 66). Trade conditions have been improved and outstanding evils have been reduced. The Credit Rules, in short have promoted the integrity of

*See in this connection R., p. 130.

contractual relations; this being so, any attendant restraints were "incidental to this legitimate purpose, and therefore not unreasonable or unlawful" (Opinion, R., p. 71).

CONCLUSION.

The decree of the District Court should be affirmed.

Dated, New York, N. Y., October 18, 1930.

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APPENDIX.

A Digest of Some Typical "Fraudulent Transfer" Cases.

(a) Atlanta.

Transfer of Ensley and Franklin Theatres in the Town of Ensley, Alabama.

This case concerns the transfer of two theatres in the town of Ensley, Alabama. The first theatre, the Franklin Theatre, was owned and operated by one Joe Steed, and had outstanding $18,588.50 worth of uncompleted contracts for the future exhibition of pictures. The second theatre, the Ensley Theatre, was owned and operated by one R. B. Wilbey, and had outstanding $12,010.75 worth of uncompleted contracts for the future exhibition of motion pictures. Steed and Wilbey conceived the idea of forming a corporation consisting of themselves to take over the operation of both theatres. This they proceeded to do, Wilbey becoming president of the new corporation and Steed the treasurer. The theatres were transferred to the new corporation, which filed a questionnaire with the credit committee of the Atlanta Film Board of Trade rejecting all contracts for both theatres. Mr. Wilbey appeared before the credit committee and agreed with the committee to see that the new corporation carried out, played and paid for the contracts of the Ensley Theatre, the one formerly operated by himself, these contracts as stated being in the amount of some $12,000. The pictures under these contracts were permitted to be shown at both theatres, although the contract itself permitted exhibition at the Ensley Theatre only, the distributors who held the contracts permitting this adjustment. Steed's contracts were not taken over, and the $18,000 involved were a total loss to the distributors concerned (R., pp. 123, 153-157, 164-168).

Appendix

The willingness of distributors to deal liberally with exhibitors even in this case is clearly shown by Mr. Cole's testimony as follows (R., p. 123):

> "Q. Did the distributors ask for the time being that the Ensley Theatres put up security as a condition to making new contracts?
>
> "A. Yes; it was placed on the fraudulent transfer list, or FT list, just for a day or two at a time and Wilbey would come over and assure us that he would get it all straightened out, and that he was going personally to see that his contract would be taken care of and they would lift these FT rulings and continue right on with the bookings—with the spot bookings—until it was personally approved by the credit committee, and they agreed. Mr. Wilbey is a pretty responsible man in that territory and operates a number of theatres. At the same time they knew this deal was very shady, but just on his assurance that he would see that the $12,000 worth of contracts were taken care of they thought it better to salvage those than to lose all of them.
>
> "Mr. Wilbey did not put up security at any time, and both theatres continued showing pictures during the period of this altercation."

Ritz Theatre, Tuscaloosa, Alabama.

One Francis operated the Ritz Theatre at Tuscaloosa, Alabama, under a lease. On the ground that he was not making any money he asked for and obtained reductions in the prices under various contracts. Thereafter Francis transferred his theatre to one King, who was in his employ in the capacity of projectionist. King thereupon proceeded to repudiate and reject all Francis' contracts. In spite of his claim that he had placed a considerable sum of money in the theatre, King refused to

come and appear before the credit committee of the Atlanta Film Board of Trade, although the expense involved in coming to Atlanta for such an appearance would have been approximately $10. Security was demanded on new contracts but King refused to comply, and ran his house on pictures obtained from a distributor not a member of the Film Board of Trade. Later the theatre changed hands again (R., pp. 123-124, 144, 147-148).

(b) Dallas.

Family Theatre, Houston, Texas.

The Family Theatre at Houston, Texas, was operated by one Gironard, who, at a time when he had quite a number of contracts outstanding, purported to transfer this theatre to one Hall; but the credit committee had reason to believe that Hall was merely the manager of the theatre for Gironard, Hall having designated himself in his letters as agent. He was also known to the credit committee as having previously signed contracts for a theatre that never materialized. Hall agreed to assume the former owner's contracts but later repudiated part and assumed only parts of the former owner's contracts, and obtained service on these contracts (R., pp. 96, 191-192).

Palace Theatre, Daingerfield, Texas.

The Palace Theatre is situated in Daingerfield, Texas, about 250 miles from Dallas. The theatre was owned and operated by the partnership of Newson & White. The theatre was apparently transferred from the partnership to one of the partners, Mr. Newson, who was to be the sole owner. But after the transfer he promptly repudiated the partnership contract. The credit com-

mittee thereupon recommended a $500 deposit on new contracts. At the time of the transfer the theatre was not actually open but Mr. Newson was planning to reopen the theatre. Later the theatre was taken over by another person whose status was approved (R., pp. 102, 216).

Voga Theatre, Voga, Texas.

The Voga Theatre was operated by one Yates, who had outstanding one contract covering some 48 feature pictures and 48 short subjects. There was an alleged transfer of this theatre to one "Farmer Jones", who turned out to be a fictitious person. The credit committee recommended a $50 deposit on new contracts. The transfer never materialized, the former owner closing his the..re and going for a while to California. He later returned and played out his contracts (R., pp. 103 and 217).

Riggs Theatre, Monahans, Texas.

The Riggs Theatre was owned by one Yates and was situated in Monahans, Texas, an oil town about 450 miles from Dallas. Mr. Yates had some contracts outstanding and was involved in some trouble in regard to them, and was in default on some arbitration awards. Yates transferred the theatre to one Estes, his brother-in-law, who proceeded to repudiate part of his transferor's contracts. The credit committee recommended a deposit on new contracts. However, prior to this recommendation two distributors had taken new contracts with Mr. Estes without a deposit, which contracts were fulfilled. This theatre changed hands several times subsequently, and was abandoned when the oil town "played out" (R., p. 103).

Rialto Theatre, Claude, Texas.

The Rialto Theatre was owned and operated by one J. M. Wise, who had $3,000 worth of uncompleted contracts outstanding when he purported to transfer the theatre to his sister-in-law, one Susie Gray. Miss Gray filed a questionnaire in which she did not state whether the theatre was owned or leased, and otherwise failed to return a complete questionnaire. She did, however, state in her questionnaire that she had had no previous experience in the motion picture business, whereas it developed that she had been in the business before and, that there was an uncomplied with arbitration award against her. She further stated that she would assume none of her brother-in-law's contracts. The credit committee recommended a $100 deposit on new contracts. Apparently the alleged transfer was not carried through, and the theatre continued receiving service. The next month this theatre was apparently transferred again, as one Mitchell was reported to be making its new contracts. Mitchell turned out to be house manager for one Snodgrass, the purchaser, who assumed none of Wise's contracts. Since Wise had attempted to make one fraudulent transfer, and since nothing was known of Snodgrass, except that he stated he was in the restaurant business, a $50 deposit was recommended on new contracts. Mr. Snodgrass placed this deposit with three distributors. After ninety days the recommendation was retracted and the deposits refunded (R., pp. 104, 220).

(c) Omaha.

Amusu Theatre, Casey, Iowa.

The Amusu Theatre was first operated by one Wahe, then sold to a man by the name of Valentine, who

did not assume any of Wahe's contracts. Wahe then formed a partnership with a man by the name of Skellinger and took the theatre back from Valentine. The theatre was then transferred by Wahe and Skellinger to one Mohnsen, all these transfers taking place within a period of a year and a half. Mohnsen returned a very incomplete questionnaire, leaving out all reference as to whether the theatre was leased or the length of time for which it was leased. Furthermore, he claimed that one of the outstanding contracts of the theatre had been signed by an incompetent by the name of Debolt; actual production of the contract, however, showed it to have been signed by Wahe and Skellinger. The matter was finally adjusted and the theatre cleared (R., pp. 135, 136, 263, 264).

*Lytton Theatre, Lytton, Iowa.**

The Lytton Theatre was owned and operated by a Mrs. Jones, who was succeeded by a Mr. Hull. Hull agreed to assume all of Mrs. Jones' outstanding and uncompleted contracts, which agreement was forwarded to the credit committee; but he later stated that he could not possibly carry out this agreement because of the large number of pictures under contract, claiming that when he agreed with Mrs. Jones to do so, he was unaware of the number involved. The distributors at his request cut down the number of pictures he was required to play so that he could play out his contract within the period of a year. This adjustment was made without any cost to Mr. Hull (R., pp. 136, 271, 273-276).

* This case is not a fraudulent transfer case, but furnishes a good example of the distributors' willingness to make suitable adjustments on contracts even where the new owner has agreed to assume the former owner's contracts. See also R., p. 97.